E-FILED: 8.8.2007

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PIOTR J. GARDIAS,

Plaintiff,

v.

SAN JOSE STATE UNIVERSITY,

Defendant.
_____/

No. C04-04086 HRL

Consolidated With: C04-04768 HRL
C05-01242 HRL
C05-01833 HRL
C06-04695 HRL

ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM MATTER DEEMED ADMITTED

[Re: Docket No. 203]

Defendant moves for an order for relief from matter deemed admitted. Plaintiff opposed the motion. Having considered the moving and responding papers, as well as the arguments presented at the August 7, 2007 hearing, the court grants the motion.

This is a consolidated action for alleged employment discrimination filed pursuant to 42 U.S.C. § 2000e-5. Plaintiff is employed by San Jose State University. He claims that defendant (a) failed to promote him on the basis of his age and national origin; (b) retaliated against him for filing employment complaints; and (c) discriminated against him on the basis of an alleged disability.

Plaintiff says that he served a request for admission ("RFA") on defendant in September 2006. On a prior motion, he submitted to the court a proof of service indicating that

service was, in fact, effected on or about September 6, 2006. (*See* Docket No. 189). Defendant's response admittedly was not served until around November 27, 2006, and plaintiff argues that the failure to timely respond to the RFA resulted in automatic admission of the matter requested. Defendant contends that either plaintiff's RFA was never properly served on defense counsel's office, or, if there was a proper service when plaintiff says, that copy was misplaced. This court accepts plaintiff's assertion that the RFA properly was served. Nonetheless, it concludes that defendant is entitled to have any deemed admission withdrawn.

When a party fails to timely respond to requests for admission, the matters requested are automatically deemed admitted. *See* FED.R.CIV.P. 36(a) ("The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney."). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." FED.R.CIV.P. 36(b).

Withdrawal or amendment of the admissions may be permitted where (1) the presentation of the merits of the action will be furthered by the withdrawal; and (2) withdrawal will not prejudice the party who obtained the admission in maintaining the action or defense on the merits. FED.R.CIV.P. 36(b). "[A] district court must specifically consider both factors under the rule before deciding a motion to withdraw or amend admissions." *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007).

"'The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.'" *Conlon*, 474 F.3d at 622 (quoting *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)). Here, the admission at issue reportedly concerns whether defendant submitted all job description information for a "Construction Coordinator" position to the EEOC. Plaintiff contends that defendant failed to do so and, therefore, "falsifi[ed] criteria by Defendant to pro[ve] U.S. EEOC that chosen applicant was qualified for the position Construction Coordinator." (*See* Docket No. 172). According to

defendant, its records show that all information was submitted to the EEOC. It is not readily apparent that the deemed admission is a key component to the merits of plaintiff's case. Nevertheless, insofar as the admission bears upon defendant's veracity and its conduct with respect to plaintiff, the court finds that permitting withdrawal will further the presentation of the merits.

Plaintiff has the burden of establishing that he will be prejudiced if the admissions are withdrawn. *See Conlon*, 474 F.3d at 622 ("The party relying on the deemed admission has the burden of proving prejudice."). "The prejudice contemplated by Rule 36(b) is 'not simply that the party who obtained the admission will now have to convince the factfinder of its truth.'" *Hadley*, 45 F.3d at 1348 (quoting *Brook Village North Associates v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982)). "'Rather, it relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted." *Id.* "Courts are more likely to find prejudice when the motion for withdrawal is made in the middle of trial." *Hadley*, 45 F.3d at 1348.

In the instant case, discovery remains open, and trial is not set to begin for another seven months. Moreover, there is no indication that plaintiff will be prejudiced if the deemed admission is withdrawn. At oral argument, plaintiff seemed to suggest that he has been, or would be, prejudiced in his efforts to take discovery.[1] However, he was not able to say how his efforts to take discovery have been (or would be) impeded. Nor has he shown how he has been prejudiced, if at all, in his ability to maintain this action on the merits. In any event, it seems that plaintiff was on notice soon after the service of defendant's belated response in November 2006 that defendant contended that his RFA was not properly served (and that any lateness in the service of its response therefore should be excused). Further, even assuming there was some discovery plaintiff feels is lacking (and on the record presented, there appears to be none),

[1] Plaintiff reiterated this sentiment in a one-page response which was filed on the date of the motion hearing. It is not clear whether this filing was made shortly before or after the motion was heard. Either way, briefing on defendant's motion closed several weeks ago, and plaintiff's August 7, 2007 filing was improper.

the Ninth Circuit has declined to conclude that "a lack of discovery, without more, constitutes prejudice." *Conlon*, 474 F.3d at 624. Accordingly, this court concludes that the second prong of the Fed. R. Civ. P. 36(b) test is also satisfied.

The court is mindful that it may nonetheless exercise its discretion to deny withdrawal even where the two-pronged test is satisfied. *See Conlon*, 474 F.3d at 621 ("Rule 36(b) is permissive, not mandatory, with respect to the withdrawal of admissions."). However, since the court finds that there has been no prejudice to plaintiff, it will grant the motion to withdraw the deemed admission.

Based on the foregoing, IT IS ORDERED THAT defendant's motion for relief from matter deemed admitted is GRANTED.

Dated: August 8, 2007

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

5:04-cv-4086 A copy of this document will be mailed to:

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